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In The

Supreme Court of the United States

October Term, 1975

No. 75-406

KURT J. WUNNICKE, and EDWARD J. PIETERS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

Louis M. Fischer
1115 Grant Street
Denver, Colorado 80203
Counsel for Petitioners

January, 1976

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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Petitioners Kurt J. Wunnicke and Edward J. Pieters respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on December 15, 1975, and (2) granting the petition. As grounds for this motion, Petitioners state the following:

1. Holding an in camera hearing without questioning the government's informer does not adequately protect a defendant's rights to a fair hearing and freedom from police misconduct.

The "Brief in Opposition" filed by the government may have clouded the issues presented, particularly in its statement, at pp. 2, 7-9, that Petitioners were urging that the informant be produced for examination by defense counsel at the suppression hearing. This has never been the crux of Petitioners' argument—not in this Court or below. Petitioners have never questioned the propriety of the holding of an *in camera* hearing by the trial court, and they have never asked that the informant be produced in open court. At all stages of this case, counsel have indicated their willingness to be bound by an order not to divulge to Petitioners or anyone else any information that might be revealed in an *in camera* hearing. Furthermore, while it is true that Petitioners did suggest that it might better aid the truth-finding process to allow counsel to cross-examine the informant (Pet. 8-10), the main point of Petitioners' argument has been that the trial *court* should have examined the informant *in camera*. The trial court indicated that it was concerned with the presentation of Petitioners, including their polygraph examinations, all of which raised the serious question of whether the informant existed, and if he did, whether he gained entry to Petitioners' laboratory by illegal means:

> At this point, there is only one thing I am concerned about, and that is whether or not the informant actually exists, and I think that—I am not sure what I can do unilaterally or in camera, ex parte, so

> to speak. I am willing to make a further investigation, find out or request the government to produce this man to me, but that doesn't give you the opportunity to face him, but the only reason I am doing that—I don't think I have to do that—but I do think you have done your homework, you gentlemen for the defense, and I think you have raised a question in my mind as to whether or not there actually was an informant in this case, and if so, was the information which he provided Martinez, I don't remember his title, but Officer Martinez, was that the basis for his saying he had probable cause to make the affidavit in connection with the search and for the eventual issuing of the warrant by the county judge, so possibly you can help me a little on what procedure the Court might follow so that the informant will have the protection that the law intends to give him and the defendants will have the protection that the law affords them. (Record on Appeal, vol. IV, pp. 208-209.)

Despite this stated concern about the existence of the informant, the district court proceeded to hold an *in camera* hearing at which he only examined the affiant police officer, Detective Martinez. Petitioners have argued that, at the least, the only manner in which a court could learn whether an informant actually exists is to personally examine the alleged informant. The procedure that was instead followed below cannot possibly aid the truth-finding process, for if the affiant was not telling the truth in the first instance, he could easily maintain that position in the *in camera* hearing. And, assuming *arguendo* that the informer did exist, then an examination of only the affiant would not resolve the question of his reckless handling of information possibly supplied him by the informant.

The Court of Appeals for the Sixth Circuit has recognized the implications of this problem, again in a case involving allegedly false representations in an affidavit:

> [I]t must be recognized that law enforcement agents presenting evidence to magistrates could make a mockery of the magistrate's role if, in the necessarily ex parte proceeding, they could freely employ false allegations in order to secure the warrant. The same could likewise be true if the agents could, with impunity, draft affidavits with utter recklessness as to truth or falsity. In either instance there would be a lack of good faith in the performance of the agent's duty to the judicial officer. *United States v. Luna*, — F. 2d — (No. 75-1084, CA 6 1975) (slip opinion at p. 7).

Where, as here, the trial court has been presented with more than a bare allegation that the information in the affidavit is false, and where the court itself indicates that it feels that investigation beyond the four corners of the affidavit is merited, the key question is how that investigation should be conducted and what witnesses should be examined. Petitioners suggest that in such a circumstance the trial court should be given discretion to hold an *in camera* hearing, but that the crucial witnesses, i. e., those with knowledge bearing on the alleged falsity, should be required to be present and be examined by the court. Virtually every court of appeals that has been presented with this question has recognized that the trial court should have discretion as to whether to exclude counsel and/or the defendants from the hearing, but every decision has also recognized that the informant should be present and be questioned.

In *United States v. Anderson,* 509 F. 2d 724 (CA 9 1975), cert. denied 420 U. S. 910 (1975), the court approved an *in camera* procedure that followed Proposed Rules of Evidence, Rule 510(c)(3) (56 F. R. D. 183, 255-256). Both the defendant and defense counsel were there excluded from the hearing, but the court did examine the government's witnesses. The Ninth Circuit approved a flexible procedure which gave the trial court discretion, but only a discretion which extended to the inclusion or exclusion of the defendant and counsel. There was no sanctioning of a failure to examine the alleged informant. In *United States v. Moore,* 522 F. 2d 1068 (CA 9 1975), cert. pending, No. 75-464, the district court conducted an *in camera* hearing in which FBI agents and the government's informer were questioned without the presence of counsel or the defendant. In approving this procedure, the Ninth Circuit said:

> In recent cases, our court has approved such *in camera* interviews for the purposes of determining whether law enforcement officers have justifiably trusted the conclusions drawn by an informer whose reliability has otherwise been established, *United States v. Anderson,* (citations omitted). * * * The *in camera* procedure provides an equally acceptable accommodation of the competing interests of the Government and the accused in the situation presented here, wherein the question is whether a law enforcement officer has lied. Through disclosure of the informer's identity to the trial judge, and such subsequent inquiries by the judge as may be necessary, the Government can be protected from any significant, unnecessary impairment of necessary secrecy, yet the defendant can be saved from what could be serious police misconduct. (Footnote omitted.) *Id.* at 1072-1073.

This is precisely the issue presented by this case, namely, how to best reconcile the competing interests presented and protect both the government's interest in secrecy and the defendant's interest in fairness and freedom from police falsehoods. While the government's interest in the protection of its informant can be most adequately preserved by the procedure of an *in camera* hearing, the defendant's rights cannot be preserved except by examination of the informant, at the very least by the trial judge.[1] Unless this Court determines, either as a matter of Constitutional doctrine or pursuant to this Court's supervisory powers, that a trial court conducting an *in camera* hearing in such circumstances must make inquiry of the alleged informant, the specter of police misconduct and misrepresentation that is raised by *United States v. Luna, supra,* cannot be dispelled. The remedy cries out in its simplicity, and yet it was ignored below. Other courts have recognized its merit, see, e. g., *United States v. Hurse,* 453 F. 2d 128, 131 (CA 8 1972), appeal after remand, 477 F. 2d 31, cert. denied 414 U. S. 908; *United States v. Jackson,* 384 F. 2d 825 (CA 3 1967), cert. denied 392 U. S. 932; *United States v. Winters,* 420 F. 2d 523, 524 (CA 3 1970); *McLawhorn v. North Carolina,* 484 F. 2d 1, 5 n. 12 (CA 4 1973). In order to resolve the conflict between the decision below and those of other circuits, and in order to adequately balance the rights of defendants against those of the government, this Court should grant the writ to review the decision below.

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1 While Petitioners still maintain that the truthfinding process would be better served by allowing counsel to participate in the **in camera** hearing under restrictions as to the divulgence of information their primary concern is that the trial court conduct a hearing that would adequately preserve their rights.

CONCLUSION

For the reasons stated above, as well as those contained in the Petition for Writ of Certiorari, Petitioners pray that this Court g r a n t rehearing of the order of denial, vacate that order, grant the Petition and review the judgment and opinion below.

Respectfully submitted,

Louis M. Fischer

1115 Grant Street
Denver, Colorado 80203

Counsel for Petitioners

January, 1976

CERTIFICATE OF COUNSEL

As counsel for Petitioners, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Louis M. Fischer